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[REDACTED]

**STATE OF WISCONSIN**  
**Division of Hearings and Appeals**

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In the Matter of

[REDACTED]  
[REDACTED]  
[REDACTED]

DECISION

FCP/149818

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**PRELIMINARY RECITALS**

Pursuant to a petition filed June 06, 2013, under Wis. Admin. Code § DHS 10.55, to review a decision by the Milw Cty Dept Family Care - MCO in regard to Medical Assistance, a hearing was held on October 01, 2013, at Milwaukee, Wisconsin.

The issue is whether the agency correctly discontinued Petitioner's Family Care Program (FCP) eligibility because she no longer meets functional eligibility requirements.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:

[REDACTED]  
[REDACTED]  
[REDACTED]

Petitioner's Representative:

[REDACTED]  
[REDACTED]  
[REDACTED]

Milwaukee, WI 53214

Respondent:

Department of Health Services  
1 West Wilson Street  
Madison, Wisconsin 53703

By: Lillian Alford

Milw Cty Dept Family Care - MCO  
901 N 9th St  
Milwaukee, WI 53233

ADMINISTRATIVE LAW JUDGE:

David D. Fleming  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. Petitioner (CARES # [REDACTED]) is a resident of Milwaukee County. She has been eligible for the Family Care Program (FCP) at the nursing home level of care.

2. Petitioner was sent a letter date May 24, 2013 that informed her that she no longer met the nursing home level of care for the Family Care program (FCP) but remained eligible for non nursing home services. No effective date was noted. Benefits were ordered continued pending a hearing decision.
3. Petitioner is 47 years of age (DOB 06/24/1966). She lives in the community with an autistic child. Her diagnoses include, but are but limited to, arthritis throughout her body, auto immune disorders, diabetes, HBP and neuropathy.
4. On May 22, 2013 the agency conducted a review of Petitioner's functional abilities via an in home assessment. That was followed up by a June 6, 2013 functional ability rescreen and another in-home assessment on July 31, 2013.
5. The agency results from these three assessments was mixed but the final screening found that Petitioner needed some assistance with the ADLs of bathing, dressing, mobility and the IADLs of meal preparation and medication management/administration. The agency did not find that the degree of assistance was sufficient to maintain functional eligibility for the nursing home level of care.

### DISCUSSION

The Family Care Long Term Care program (FCP) is a long-term care benefit for the elderly, people with physical disabilities and those with developmental disabilities. *Medicaid Eligibility Handbook (MEH)*, §29.1. It is authorized in the Wisconsin Statutes, §46.286, and is described comprehensively in the Wisconsin Administrative Code at Chapter DHS 10. Also see *Medicaid Eligibility Handbook (MEH)*, §29.1.

Once a person has been enrolled in FCP they may become ineligible for a variety of reasons, including a change in functional eligibility. *Id.*, §29.5.2.

As of January 1, 2008 the levels of care are:

1. Nursing Home (formerly Comprehensive NH)
2. Non-Nursing Home (formerly Intermediate and Comprehensive non-NH)

See the *MEH*, §29.4.

*Wis. Admin. Code*, §DHS 10.33(2) provides that an FCP applicant must have a functional capacity level of comprehensive or intermediate; I note here, however, that Wis. Stat., §46.286, uses the terms "nursing home" and "non-nursing home" levels just as the agency in this case. If the person meets the comprehensive (nursing home) level, s/he is eligible for full services through a care management organization (CMO), including Medical Assistance (MA). *Wis. Admin. Code*, §DHS 10.36(1)(a). If the person meets the intermediate (non-nursing home) level, s/he is eligible for full services only if s/he is in need of adult protective services, s/he is financially eligible for MA, or she is grandfathered as described in §DHS 10.33(3). *Wis. Admin. Code*, §DHS 10.36(1)(b). A person eligible under the non-nursing home level is eligible for less FCP services.

Comprehensive functional capacity is defined at *Wis. Admin. Code*, §DHS 10.33(2)(c):

(c) Comprehensive functional capacity level. A person is functionally eligible at the comprehensive level if the person requires ongoing care, assistance or supervision from another person, as is evidenced by any of the following findings from application of the functional screening:

1. The person cannot safely or appropriately perform 3 or more activities of daily living.
2. The person cannot safely or appropriately perform 2 or more ADLs and one or more instrumental activities of daily living.
3. The person cannot safely or appropriately perform 5 or more IADLs.
4. The person cannot safely or appropriately perform one or more ADL and 3 or more IADLs and has cognitive impairment.
5. The person cannot safely or appropriately perform 4 or more IADLs and has cognitive impairment.
6. The person has a complicating condition that limits the person's ability to independently meet his or her needs as evidenced by meeting both of the following conditions:
  - a. The person requires frequent medical or social intervention to safely maintain an acceptable health or developmental status; or requires frequent changes in service due to intermittent or unpredictable changes in his or her condition; or requires a range of medical or social interventions due to a multiplicity of conditions.
  - b. The person has a developmental disability that requires specialized services; or has impaired cognition exhibited by memory deficits or disorientation to person, place or time; or has impaired decision making ability exhibited by wandering, physical abuse of self or others, self neglect or resistance to needed care.

Intermediate functional capacity is defined at *Wis. Admin. Code, §DHS 10.33(2)(d)*:

- d) Intermediate functional capacity level. A person is functionally eligible at the intermediate level if the person is at risk of losing his or her independence or functional capacity unless he or she receives assistance from others, as is evidenced by a finding from application of the functional screening that the person needs assistance to safely or appropriately perform either of the following:
  1. One or more ADL.
  2. One or more of the following critical IADLs:
    - a. Management of medications and treatments.
    - b. Meal preparation and nutrition.
    - c. Money management.

A person's long term care needs and the level of care are determined by use of the Long Term Care Functional Screen. The Long Term Care Functional Screen (LTCFS) is a functional needs assessment describing assistance needed with:

- **Activities of Daily Living** (ADL's-bathing, dressing, mobility, transfers, eating, toileting)
- **Instrumental Activities of Daily Living** (IADL's-meal preparation, medication management, money management, laundry, telephone, transportation, and employment)
- **Health Related Tasks** (including skilled nursing)
- **Diagnoses**
- **Behavioral Symptoms and Cognition**

The LTC FS also includes information on risk factors, mental health and substance abuse, and where the person would like to live. *Source: Wisconsin Department of Health Services, online, Adult Long-Term Care Functional Screen, Module #1: Overview of the Long Term Care Functional Screen (LTC FS), §1.1 History. (<http://dhs.wisconsin.gov/lc/FUNCTIONALSCREEN/instructions.htm>)*

The ADLs are bathing, dressing, eating, mobility in the home, toileting and transferring. The IADLs are meal preparation, medication administration and management, money management, laundry and/or chores, use of the telephone, transportation, overnight care or supervision and employment. *Id.*, *Module*

#4. Petitioner is not cognitively impaired so must be unable to safely perform 3 or more activities of daily living; 2 or more ADLs and 1 or more IADLs or 5 or more IADLs to meet the nursing home level of care to be found functionally eligible at the nursing home/comprehensive level of care.

Here the parties agree completely on the facts. Petitioner does require assistance with 3 ADLs (bathing, dressing and mobility) and 2 IADLs (meal prep and medication administration and management). The FCP, however, is constrained by the LTCFS which categorizes the degree of care needed and concluded here that Petitioner does not 'pass' the LTCFS as to the nursing home level of care because the degree of care needed is not hands on enough to maintain the nursing home level of care. On the other hand, Petitioner's advocate points to the law above and contends that under the law Petitioner is functionally eligible for the nursing home level of care thus her FCP eligibility was incorrectly discontinued. Petitioner points to Division of Hearings and Appeals decisions that have stated the same thing. Division of Hearings and Appeals decisions do not have precedential value but can be persuasive in their reasoning. A relevant portion of one of those decisions captures the conclusions of the other decisions cited by Petitioner and states:

...

As evidenced by the March 2012 screen, the petitioner falls within the comprehensive functional capacity definition – she cannot safely/appropriately perform two ADLs and one IADL (item 2 above). Thus, per code, she meets the comprehensive/nursing home level of care. The code has the force of law, and must be followed. Therefore, although the screening personnel followed their DHS instructions correctly, the discontinuance of the petitioner's IRIS eligibility due to failure to meet the level of care requirement was incorrect. This decision is in accord with prior decisions FCP-11/113325 (Wis. Div. of Hearings & Appeals October 26, 2010, ALJ Schneider)(DHS), FCP-44/115906 (Wis. Div. of Hearings & Appeals April 5, 2011, ALJ Schneider)(DHS), and Rehearing FCP/130316 (Wis. Div. of Hearings & Appeals September 29, 2011, ALJ O'Brien)(DHS).

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DHA Case # CWA-139759 at page 3, issued July 9, 2012.

Both parties have checked with DHS to see if the law and LTCFS conflict is resolved and it has not. Given the agreement as to Petitioner's capabilities as to ADLs and IADLs I am concluding that she is functionally eligible for the nursing home level of care.

### **CONCLUSIONS OF LAW**

That Petitioner requires assistance with 3 ADLs and 2 IADLs so continues to meet the legal requirements necessary to be eligible for the nursing home level of care for the Family Care Program.

**THEREFORE, it is**

### **ORDERED**

That the petition is remanded to the agency with instructions to reverse the discontinuance of Petitioner's FCP benefits provided she is otherwise eligible for the program. This action shall be taken within 10 days of the date of this Decision.

### **REQUEST FOR A REHEARING**

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative

Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

### **APPEAL TO COURT**

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

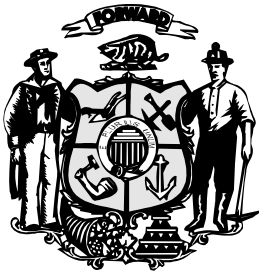
For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,  
Wisconsin, this 31st day of October, 2013

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\sDavid D. Fleming  
Administrative Law Judge  
Division of Hearings and Appeals



**State of Wisconsin\DIVISION OF HEARINGS AND APPEALS**

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The preceding decision was sent to the following parties on October 31, 2013.

Milw Cty Dept Family Care - MCO  
Office of Family Care Expansion  
[penelopeg@drwi.org](mailto:penelopeg@drwi.org)